STATE OF MICHIGAN

COURT OF APPEALS

JILL D. TYTOR, as Personal Representative of the Estate of NORBERT J. TYTOR, Deceased,

Plaintiff-Appellant,

v

JAMES MACKENZIE, M.D.,

Defendant-Appellee.

UNPUBLISHED
February 9, 2006

No. 262824
Oakland Circuit Court
LC No. 04-057544-NM

Before: Murray, P.J., and Jansen and Kelly, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I would conclude that the Michigan Supreme Court's decision in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) ("*Burton II*"), should be prospectively applied under the circumstances of this case and, therefore, that summary disposition in favor of defendant was improper. Accordingly, I would reverse the grant of summary disposition.

""The general rule is that judicial decisions are to be given complete retroactive effect . . . . "" *Ousley v McLaren*, 264 Mich App 486, 493; 691 NW2d 817 (2004), quoting *Lincoln v Gen Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000), quoting *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (intermediate citation deleted). "'[A] more flexible approach is warranted where injustice might result from full retroactivity.'" *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), citing *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). The Michigan Supreme Court has also recognized and focused the inquiry on a threshold question whether the decision "clearly established a new principle of law." *Pohutski*, *supra* at 696.

> [T]he first criterion that must be determined in deciding whether a judicial decision should receive full retroactive application is whether that decision is establishing a new principle of law, either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties. If the decision does not announce a new principle of law, then full retroactivity is favored. [*MEEMIC v Morris*, 460 Mich 180, 190-191; 596 NW2d 142 (1999).]

However, although full retroactivity is favored when a decision "does not announce a new principle of law," *id. at* 190, neither our Supreme Court nor this Court has ever limited application to when new principles of law are announced.

Here, I would find that *Burton v Reed City Hosp Corp,* 259 Mich App 74; 673 NW2d 135 (2003), rev'd 471 Mich 745 (2005) ("*Burton I*") was clear past precedent which specifically held that the filing of an early complaint tolled the statute of limitations under facts similar to the instant case. Therefore, *Burton II* does not represent, for instance, the same type of situation this Court faced when it concluded that the *Waltz v Wyse,* 469 Mich 642, 655; 677 NW2d 813 (2004) ruling should be applied retroactively. *Ousley, supra* at 493-495. Rather, the *Ousley* Court noted that, to the extent that *Waltz* overruled case law at all, it merely overruled "confusing and imprecise dicta" contained in *Omelenchuck v City of Warren,* 461 Mich 567; 609 NW2d 177 (2000), rev'd on other grounds 466 Mich 524 (2002). *Id.* at 494-495, citing *Waltz, supra* at 653-655. To the contrary, in the instant case *Burton II* explicitly overruled the crux of the holding in *Burton I.*

I would find that plaintiff reasonably relied on a court ruling which explicitly held that she could preserve her suit. She filed 132 days after she served the notice of intent; this date was merely twenty-two days short of the earliest date she could have filed. Plaintiff, arguably, reasonably decided not to refile given that defendant may have chosen not to challenge the filing in light of *Burton I,* which would have allowed plaintiff to merely reinstitute the suit after a dismissal without prejudice. Thus, the retroactive application of *Burton II* would operate to deprive her of a potentially meritorious suit which – had she not relied on *Burton I* – she merely could have refiled before the statute of limitations expired.

Although *Burton II* explains that *Burton I* was a departure from the language of the notice provision and from earlier cases, no previous case explicitly contradicted the *Burton I* holding. Thus, *Burton I* does not represent a stark departure from previous law that warrants retroactivity despite a party's reliance, as was the case, for instance, in *MEEMIC, supra* at 197. There, the Supreme Court retroactively applied a decision which directly overturned *Profit v Citizens Ins Co of America,* 187 Mich App 55; 466 NW2d 354 (1991), rev'd 444 Mich 281 (1993) ("*Profit I").* In *Profit I,* this Court held that social security benefits could not be subtracted from work loss benefits awarded under Michigan's no-fault statute. Two years after the *Profit I* decision – and after the defendants in *MEEMIC* began receiving full benefits from the plaintiffs – the Supreme Court overturned *Profit I* in *Profit v Citizens Ins Co of America,* 444 Mich 281; 506 NW2d 514 (1993) ("*Profit II*"). *MEEMIC, supra* at 184-185, 186-188. The *MEEMIC* Court decided that the defendants had received payments to which they were not entitled because *Profit II* retroactively applied. *Id.* at 197-198. The Court noted that *Profit I,* despite its technical status as controlling precedent for trial courts, directly contradicted the unambiguous language of the no-fault act; and, most significant, *Profit I* was also directly contrary to two previous decisions of the Supreme Court which ruled that social security benefits must be subtracted from personal protection benefits under Michigan's no-fault scheme. *Id.* at 195-197. Therefore, the Court opined that *Profit II* was "not an unforeseeable decision that had the effect of changing the law, nor did it establish a new rule of law[; r]ather, it reaffirmed the existing law that was misinterpreted by" *Profit I. Id.* at 197. *Burton I,* on the other hand, did not follow explicitly contradictory case law.

The prospective application of *Burton II* enhances – and, at a minimum, does not hinder – the administration of justice. First, it allows for preservation of a class of suits filed after *Burton I* and before *Burton II* which, otherwise, merely could have been preserved through earlier refiling had the plaintiffs not relied on *Burton I*. Second, in a related sense, prospective application preserves *only* this small class of otherwise viable suits; prospectivity would not create ongoing confusion in the administration of justice nor would it reach into the past and revive suits dismissed before October 14, 2003, the date on which *Burton I* was released.

In light of the apparent reliance on *Burton I*, I believe justice requires a prospective application. Our Supreme Court has recognized that "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley v C & H Indus*, 431 Mich 632, 644-645; 433 NW2d 787 (1988). (opinion by Griffin, J.) Fairness and public policy both support a prospective application because serious injustices could result from a retroactive application and prospective application of the ramifications of *Burton II* accomplishes a "maximum of justice" under the presented circumstances. *Lindsey, supra* at 68. In addition, I would find that equity supports a prospective application. See generally *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004); *Apsey v Memorial Hosp (On Reconsideration)*, 266 Mich App 666, 681; 702 NW2d 870 (2005). Because I would apply *Burton II* prospectively, I would find that plaintiff's claims are not time barred under *Burton I* because the statute of limitations was tolled when she filed the earlier complaint along with her affidavit of merit.

For the above stated reasons, reversing the trial court's order granting defendant's motion for summary disposition and allowing plaintiff's claims to proceed would best serve justice and equity. I would reverse and remand for further proceedings.

/s/ Kathleen Jansen